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No. 87-1796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RUTH MASSINGA, *et al.*,

Petitioners,

v.

L.J., *et al.*,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

REPLY BRIEF OF PETITIONERS

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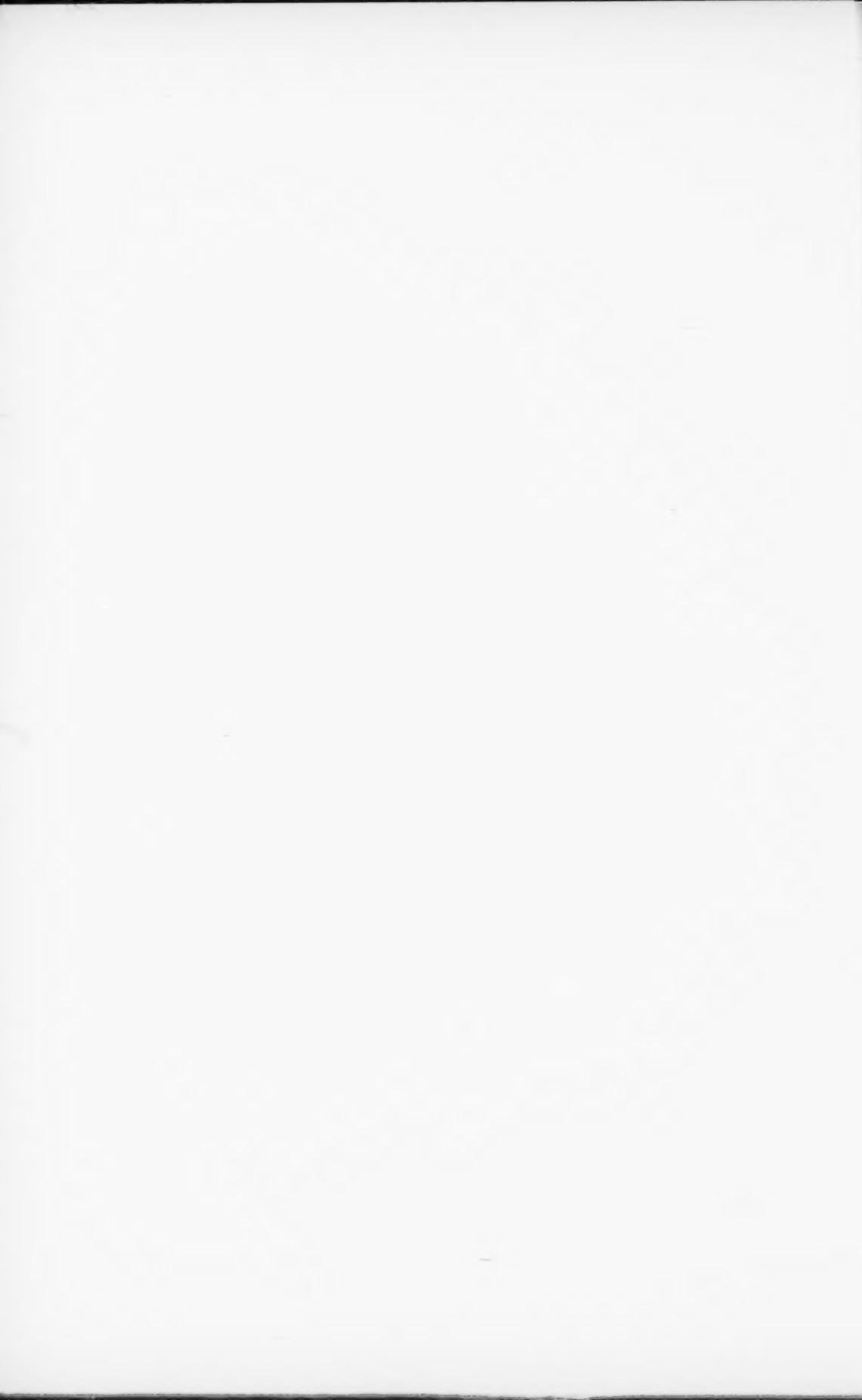
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PETITIONERS' REPLY BRIEF

This brief replies to respondents' arguments that this Petition presents only a very narrow issue of law (Brief in Opposition, pp. 9-14) and demonstrates that substantial and unresolved questions of federal law compel review by this Court.

Ten states argue to this Court that the Fourth Circuit decision depriving

social workers of qualified immunity has a truly staggering impact on thousands of state officials who administer federal grant programs. 1/ Social workers, in particular, are now exposed to lawsuits and second-guessing for difficult decisions made decades ago and are expected to meet unrealistic and ill-defined standards of performance. 2/

Respondents strain to diminish the importance of this case but cannot disguise the overriding public concern for preserving the qualified immunity defense. To deflect the Court's attention from this issue, respondents rely on questionable interpretations of the Rules

1/ See Brief of States as Amici Curiae, ("States") p. 2.

2/ See Motion for Leave to File Brief as Amicus Curiae of National Association of Social Workers ("Social Workers"), pp. 2-3.

of this Court 3/, narrowly state petitioners' argument 4/, and fail to cite

- 3/ For example, respondents argue that this Petition is brought only by "social workers," see Brief, pp. 10-11, and state: "The Petition nowhere indicates which of the parties filed it." Brief, p. 11, n.1. The Petition contains this indication where it belongs — in the List of Parties. See Rule 21.1 (b). All of these parties were sued for damages and deprived of the defense of qualified immunity. And, notwithstanding respondents' exceedingly narrow use of the term, petitioners, along with ten states and the National Association of Social Workers, consider that the interests of these individuals, and thousands of unnamed persons, are at stake in this case.
- 4/ Contrary to respondents' suggestion that this case involves only "a repealed provision of law and the liability of only some of the defendants," Brief, p. 10, petitioners nowhere concede that this statute — 42 U.S.C. §608(f) — is the sole basis for appeal. Petitioners stressed that no statutory right to care and protection was clearly established until the courts below created it. Petition, pp. 6-7. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (court must determine whether law was clearly established at the time an action took place). The Question Presented focuses, as it should, on when the courts below held respondents' rights were first created; petitioners' argument that the 1980 statute — 42 U.S.C. §627 et seq — likewise creates no clearly established statutory rights comprises a "subsidiary question fairly included therein" under Rule 21.1(a).

relevant authority 5/ and misapply other authority. 6/ Respondents also err on matters of greater substance, the gravity of which justify careful review by this Court. These include the following:

A. This case raises the issue of whether the defense of qualified immunity should be transformed into a doctrine of unlimited liability. 7/ Respondents believe that mere allegations of intentional acts or of deliberate indifference are sufficient to abrogate

5/ Plaintiffs fail to cite even a single case in which this Court has upheld a right to claim damages under §1983 for violations of spending power statutes.

6/ Plaintiffs' citation to three cases upholding the right to seek damages under §1983 is unavailing, for none involved alleged statutory violations. See Brief, p. 30, citing Gomez v. Toledo, 446 U.S. 635 (1980); Owen v. City of Independence, Missouri, 445 U.S. 622 (1980); Monnell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978).

7/ See Social Workers, p. 3.

qualified immunity. See Brief, pp. 6, 37-38, 45. But at the heart of this Petition are discretionary acts made by case-workers, supervisors and administrators.

8/ Compelling defendants to stand trial for violations of a right as abstract as one to "care and protection" transforms a guarantee of immunity into a rule of pleading. Anderson v. Creighton, ____ U.S.____, 107 S.Ct. 3034, 3039 (1987). The qualified immunity doctrine looks beyond the simple expedient of artful pleading and protects officials whose judgments turn out wrong. 9/

B. Without citing any authority,

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- 8/ In essence, plaintiffs charge social workers with making wrong decisions, i.e., placing children in or failing to remove them from homes that were unsuitable. See District Court Opinion (App. 26a).
 - 9/ Accord, Mitchell v. Forsyth, 472 U.S. 511, 535 (1985) ("The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted.").

respondents argue that this Court lacks jurisdiction to decide whether damages are available under 42 U.S.C. §1983 for violations of the foster care statutes.

See Brief, pp. 12-13, 26-27, 41. 10/ This Court should resolve this important question because a reversal of the court of appeals would allow defendants to avoid further discovery and trial. 11/

Petitioners properly present this issue,

10/ The Fourth Circuit is the only circuit to hold that damages are available. Respondents argue that no conflict exists in the circuits on this point, Brief, pp. 39-40, but cannot deny that the Fourth Circuit stands alone and that other circuits have denied claims for §1983 damages under the foster care law.

11/ Mitchell, supra, 472 U.S. at 526 ("The entitlement is an immunity from suit rather than a mere defense to liability; and like absolute immunity it is effectively lost if a case is erroneously permitted to go to trial.").

12/ because no right to damages can be clearly established if it does not exist. For states administering federal grant programs, it is critical to know whether their employees now face potential suits.

13/ Whether Congress intended to create enforceable rights to damages under §1983

12/ Respondents contend for the first time that some of petitioners are city employees and therefore are not entitled to qualified immunity. Brief, pp. 43-44. See Owen, supra, 445 U.S. at 638 (municipal employees not entitled to qualified immunity defense). Regardless of whether respondents may raise this argument in this Court, it is undisputed that at least five of the petitioners — Massinga, Farrow, Duva, Nocar and Randall — are state employees.

13/ See States, p.2. This Court's decision in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) has, until the Fourth Circuit's decision, provided clear guidance: "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."

for violations of the Spending Clause statutes deserves resolution by this Court. 14/

C. Respondents argue that the qualified immunity defense has nothing to do with their right to recover damages against state officials. Brief, pp. 21-25. Yet this Court has stated that the principal rationale for affording the defense is to limit an official's liability for monetary damages. Mitchell, supra, 472 U.S. at 525. 15/ A defendant's

14/ See Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 19 (1981). Respondents' reference to injunction cases, Brief, pp. 36-37, hardly demonstrates Congressional intent to create an enforceable right to damages under §1983.

15/ See also Davis v. Scherer, 468 U.S. 183, 195 (1984) ("The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages...."); Anderson, supra, 107 S.Ct. at 3042 ("Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law.").

knowledge of remedies against him is relevant to the application of the doctrine. 16/ This Court has never adopted respondents' position that the defense distinguishes between rights and remedies. Because the Fourth Circuit in this case has virtually eroded the qualified immunity defense, this Court should carefully examine the scope of protection available to thousands of state officials.

16/ Accord, Social Workers, p. 11 ("By raising social worker vulnerability beyond what is necessary or fair, the court of appeals creates a professional environment in which avoiding liability — rather than serving children — becomes the goal.").

CONCLUSION

The Court should grant the petition and review the judgment of the Fourth Circuit for the reasons set forth herein.

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